BEFORE THE FEDERAL ELECTION COMMISSION

In the matter of

Friends of Jane Harman and Jacki Bacharach, as treasurer	)	MUR 3987

SENSITIVE

GENERAL COUNSEL'S REPORT

I. BACKGROUND

This matter involves a fundraising event held at Hughes Electronics Corporation ("Hughes") for Representative Jane Harman, which yielded in excess of $20,000 for Friends of Jane Harman and Jacki Bacharach, as treasurer, ("Harman campaign," "Committee," or "Respondents"). On April 23, 1996, the Commission found reason to believe that the Committee violated 2 U.S.C. § 441b(a) of the Federal Election Campaign Act of 1971, as amended, ("Act" or "FECA"). At the same time, the Commission also made findings with respect to Hughes and several Hughes executives. The Commission entered into pre-probable cause conciliation with both sides along with its reason to believe findings. On August 29, 1996, Hughes signed a conciliation agreement in settlement of this matter, admitting section 441b(a) violations and agreeing to pay a civil penalty of $40,000.

The matter was reassigned from departing staff in June 1997, and on October 7, 1997, this Office sent a General Counsel's Brief ("GC Brief") to the Harman campaign recommending probable cause to believe that it violated 2 U.S.C. § 441b(a). The Respondents submitted a Response Brief on November 21,

1997, denying the violation and seeking dismissal (Attachment 1). For the reasons set forth in the GC Brief, and in this Report, this Office recommends that the Commission find probable cause to believe that the Respondents violated the Act.

II. ANALYSIS OF RESPONSE BRIEF

The Respondents acknowledge that the fundraising event, which Representative Harman and her chief fundraising agent attended, was held at Hughes corporate headquarters and that the corporation collected contributions for the event totaling in excess of $20,000 and then forwarded them to the Harman campaign. The Respondents do not contest that the Hughes' Vice President for Federal Government Relations in Washington, DC was the person who actually scheduled the event with Rep. Harman's Chief of Staff and that under the direction of Mike Armstrong, Hughes' CEO, corporate staff arranged the fundraising event with the Harman campaign and drafted the initial solicitation letter on corporate stationary which Mr. Armstrong signed. Respondents also do not deny that the Government Relations VP and the Senior Vice President for Human Resources and Administration sent out a second solicitation to corporate executives for the event, using the name of the Hughes PAC. Nor do they dispute that the corporation collected the contributions via interoffice mail and at the event, and later provided them all at once to the Harman campaign.

Indeed, in its conciliation agreement, Hughes admitted that it "engaged in corporate fundraising efforts on behalf of Representative Jane Harman after Representative Harman asked Hughes' Chief Executive Officer to host a fund-raiser for her campaign"; that "[c]orporate personnel were actively involved in the fundraising endeavor, and corporate officers consented to the use of corporate resources and facilities in an effort to solicit and collect contributions for the

Committee"; and that "[t]he activities set forth constitute an organized fundraising effort by Hughes resulting in Hughes making an impermissible contribution to the Friends of Jane Harman committee." Para IV. 11, 18, 20 (GC Report dated September 10, 1996 at Attachment 1, p. 3-5).

In the face of this overwhelming evidence of corporate involvement, the Respondents essentially rely on three lines of defense, none of which is availing: (1) they erroneously claim that it was only clear that this type of corporate fundraising was impermissible after the March 13, 1996 effective date of the Commission's corporate facilitation regulations and after the public release of the conciliation agreement in MUR 3540 (Prudential Securities); (2) they claim as Rep. Harman did at her deposition that this was a Mike Armstrong fundraiser rather than Hughes fundraiser, i.e. that this fundraising event held at Hughes headquarters and in which the corporation collected contributions and delivered them directly to the campaign qualifies for the "individual volunteer" exemption, and; (3) they assert that the Harman campaign should be shielded from liability because it relied on the legal advice of counsel for the corporation.

First, contrary to the Respondents' suggestions (Attachment 1, p. 13-17), the prohibition against corporate collection of contributions that are forwarded to federal candidates was recognized long before the effective date of the 1996 regulations or the 1994 public release of MUR 3540.[1] In both the 1977 and 1989 Explanation and Justifications of Sections 110.6 and

[1] As noted, Counsel argues vigorously that the new Commission facilitation regulations do not apply to the fundraising at issue. While the Commission's Regulations continue to prohibit corporations from collecting and forwarding contributions to candidates, see 11 C.F.R. § 110.6(b)(2)(ii), the Commission's latest regulations permit a corporation to direct employees to engage in other fundraising activities only if the fair market value of their services for such activities are paid in advance by the individual or political committee. 11 C.F.R. § 114.2(f)(2)(i)(A). In this matter, the Harman campaign paid their estimation of the direct hourly costs of employee time and cost of materials more than three months after the fundraiser. Thus, the Harman campaign's payment for the fund-raiser could not be in conformance with even the revised regulations. Moreover, as stated above, the gravamen of the violation in this

114.3, the Commission stated "[t]he corporation or labor organization may not, however, facilitate the making of contributions to a particular candidate...." H. Doc. No. 95-44, 95th Cong., 1st Sess. at 104-105 (1977), reprinted in *Explanation and Justifications for Federal Election Commission Regulations* (April 1996) at 65; 54 F.R. 34106 (Aug. 17, 1989), reprinted in *Explanation and Justifications for Federal Election Commission Regulations* (April 1996) at 282 ("corporations are not permitted to act as conduits or intermediaries or facilitate the making of contributions"). *See also* Advisory Opinions ("AO") 1987-29, 1986-4, 1982-29, 1982-2.[2] Counsel points to GC Brief language about the limit of the "individual volunteer activity" exemption, arguing this language seeks "to hold the Harman Committee accountable under a standard" not publicly articulated until a year after the fundraiser at issue (Attachment 1, p. 14). The substance of this common sense statement about the "individual volunteer" exemption, however, appeared first in the General Counsel's Probable Cause Report in MUR 1690 (General Counsel's Report dated October 2, 1986 at page 9), publicly released more than seven years earlier. *See also* MUR 2668.

More importantly, whether or not some members of the regulated community may have been unaware of this prohibition against corporate fundraising for candidates, Representative Harman and her top fund-raiser, Judith Sitzer, were fully cognizant of it. Representative Harman testified (Depo at 14): "No corporations have hosted fund-raisers for me. That is against the

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matter, the corporate collection of contributions and forwarding them directly to the candidate, has always been impermissible under the FECA.

[2] Contrary to the Committee's assertions about the AOs cited and relied on in the GC Brief (Attachment 1, p. 14-15), AO's 1987-29, 1986-4, and 1982-2 each explicitly state (and 1982-29 by implication concludes) that corporations may not do what was done in this matter: facilitate the making of contributions to a federal candidate.

law." Similarly, Ms. Sitzer testified (Depo at 58) that "we are not allowed to do anything corporate. I knew that obviously."

Second, the Respondents' rely (Attachment 1, p. 10-13) on the individual volunteer activity exemption itself. As discussed supra pp. 2-3, consistent with this Office's investigation, the corporation itself has admitted that the fundraiser was a corporate event resulting in an impermissible contribution to the Harman campaign. Thus, counsel's claim is reduced to an argument that unbeknownst to Rep. Harman and Ms. Sitzer, what they intended to be a "Mike Armstrong" fundraiser "somehow 'transformed' itself from an Armstrong event to a Hughes corporate sponsored event" (Attachment 1, p. 13). As discussed in detail in the GC Brief and above, the corporation was extensively involved in this fundraising event, the corporation itself has admitted its extensive involvement, and the testimonies obtained make it clear that the Harman campaign was kept apprised of the steps taken by the corporation throughout the months leading up to the event.[3] In addition, as discussed in the GC Brief, the Harman campaign's own records described it as a "Hughes" event and Representative Harman's testimony revealed her awareness that this was a corporate event. See GC Brief at pages 11, 15-18. Perhaps most

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[3] Counsel argues pointedly (Attachment 1, p. 13) that not having received a copy prior to the event of the second Hughes letter (asking top executives to solicit their subordinates and including suggested contribution amounts), Rep. Harman and Ms. Sitzer could not know it was a corporate event. Although Ms. Costa was not as certain about whether she faxed this October 13, 1993 letter to Ms. Sitzer, she testified unequivocally that she did send her the first October 12, 1993 letter from Mr. Armstrong (GC Brief at 8: "That is why I know I sent her a copy of this"). This letter in plain terms communicates a corporate endorsement and request for support of Rep. Harman that could not have been lost on Ms. Sitzer ("[i]t is important that we support Congresswoman Harman. She is a proven friend to Hughes"; "Jane has specifically been very helpful to Hughes.... she has been effective in Washington in communicating our views and positions"). Of course, as early as the previous May, after their lunch at Hughes, Ms. Costa using her corporate stationery had written Ms. Sitzer that "I appreciate your interest in Hughes' invitation to Ms. Harman...." (GC Brief at 6).

telling was her unprompted statement that her opponent's filing of the complaint in this matter was a "foolish act . . . since it was pointing out to the universe that Hughes supported me." GC Brief at page 16 (emphasis added).

The Respondents' third line of defense, their claimed reliance on the advice of Hughes' attorneys, similarly cannot vitiate the violation in this matter. First, the assertion that "Respondents received highly specific advice from the attorneys" (Attachment 1, p. 21) is disingenuous, as the Harman campaign did not retain counsel, did not seek the advice of counsel, nor did it have any communications with campaign finance counsel prior to the event. In fact, the Harman campaign never received the only written legal advice outside counsel gave to Hughes; the corporation settled in this matter after acknowledging that belatedly it received notice (via counsel's memo) that the fundraiser as planned was improper, but that "it was too late to stop it" and "[t]he differences were technical." (Deposition of Jo-Ann Costa p. 146).

Furthermore, the very cases cited and quoted by Respondents as stating a "well-settled" rule about the reliance on advice of counsel defense make clear that (consistent with the Commission's practice) reliance on advice of counsel "is not an absolute defense, [but] it is a factor to be considered in determining a defendant's good faith, willfulness, or illegal intent," *Rea v. Wichita Mortgage Corp.*, 747 F.2d 567, 576 (10th Cir. 1984); *see also SEC v. Savoy Industries, Inc.*, 665 F.2d 1310, 1315 n.28 (D.C. Cir. 1981) ("does not operate as an automatic defense, but is only one factor to be considered in determining the propriety of injunctive relief"). Other cases cited by Respondents explain that good faith reliance on advice of counsel can be a defense to a violation requiring a showing of specific intent. E.g., *SEC v. Steadman*, 967 F.2d 636, 642-43 (D.C. Cir. 1992)(reliance on advice of legal counsel is a defense to

violations requiring scienter, but not violations requiring only showing of actions that are the equivalent of negligence); *J.J. Newberry v. NLRB*, 645 F.2d 148, 152-53 (9th Cir. 1981) (where question is "whether Respondent's motivation was unlawful," employer's reliance on advice of counsel is "a factor to be considered" and court affirms ALJ decision that the employer's action "did not have an anti-union purpose or effect and was thus not shown to be unlawful"). In this matter, while the Harman campaign conceded the knowledge that corporate fundraising is illegal and admitted that this was the only one of a multitude of its fundraising events that was held inside a corporation, there has not been any Commission finding that the acceptance of this corporate contribution was knowing and willful, and the GC Brief does not make such a recommendation. Rather, the GC Brief alleges that the Respondents knowingly accepted a corporate contribution. Section 441b's prohibition against the knowing acceptance of corporate contributions does not require *any* showing of intent. *See e.g., FEC v. California Medical Association*, 502 F. Supp. 196, 203-204 (N.D. Cal 1980)(a party's knowledge of the facts rendering its conduct unlawful constitutes "knowing acceptance" in violation of Section 441a(f)). Thus, the Harman campaign's reliance on the fact that the Hughes personnel were consulting with Hughes' outside counsel may in part justify this Office's decision not to argue the Harman campaign's violation was knowing and willful, but the claim that it entirely vitiates the violation is erroneous.

At bottom, counsel criticizes the theory of corporate fundraising for candidates as a prohibited contribution (Attachment 1, p. 18): "[i]t was the Commission, and not the Act, that decided that in an instance such as this where a candidate promptly reimburses a corporation for the expenses associated with an event held on its premises, a 'contribution' has been made."

Counsel contends the Commission's interpretation of contribution "defies the common meaning of the term" and further contends that the amount of the contribution relates not at all to the amount raised but rather only to the direct costs advanced by the corporation that is later reimbursed. Id. at 18 n.3. Although it is true that the Commission's regulations permit numerous activities by corporations in connection with federal candidates and elections, the Commission does not allow corporations to collect contributions from its executives and/or employees to forward to federal candidates. The interpretation urged by Respondents, allowing a corporation to give to a favored federal candidate large amounts of money raised from its executives, so long as the out of pocket costs are ultimately paid, would render largely superfluous the contribution limits otherwise applicable to direct campaign contributions made by the corporation's PAC. In this very case, in addition to the more than $20,000 in contributions from more than 100 executives collected and forwarded by Hughes, the Hughes PAC gave $9,500 of its $10,000 maximum amount of primary and general election contributions to the Harman campaign in '93-'94.[4]

In sum, the corporate endorsement employed to collect contributions from Hughes employees raised contributions given directly to the Harman campaign that significantly exceeded amounts that could be (and in fact were) given to the Harman campaign in direct legal

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[4] Ironically, as Respondents' broad argument does not rely at all on the Act's communication exception or PAC solicitation rules, this interpretation would also not constrain a corporation from raising individual contributions for candidates from employees beyond the organization's restricted class. Thus, while the PAC's limited direct contributions to candidates may be raised only from the restricted class, the corporation could collect and forward an unlimited amount of direct support for a chosen candidate solicited and collected at very low out of pocket cost from broad classes of corporate employees at all levels. This anomalous result is avoided by the consistent interpretation that the crucial acts of collecting and forwarding contributions that are the key elements of corporate facilitation are prohibited by section 441b.

contributions by Hughes' PAC. This unquestionably gave something of value to the Harman campaign not fully measured by the corporation's out of pocket costs ultimately reimbursed; Hughes itself acknowledged the making of this contribution in its Conciliation Agreement and the Harman campaign plainly viewed it as highly significant corporate support for Rep. Harman.

III. DISCUSSION OF CONCILIATION

IV. RECOMMENDATIONS

1. Find probable cause to believe that Friends of Jane Harman and Jacki Bacharach, as treasurer, violated 2 U.S.C. § 441b(a).

2. Approve the attached conciliation agreement and appropriate letter.

2/18/98
Date

Lawrence M. Noble
General Counsel

Staff Assigned:

Jonathan Bernstein
Xavier McDonnell

[redacted]